Sentencing Reform:

Lessons from Foreign Jurisdictions and Options for Canada

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Executive Summary

In an era in which most countries are moving towards a more structured sentencing environment, Canada is becoming increasingly anomalous. This brief report summarises recent sentencing reform developments in a number of other jurisdictions. There is a now a wealth of international experience and scholarship and this paper draws some lessons for Canada.

The paper consists of three parts. Part I identifies the principal problems with sentencing in Canada, drawing on the scholarly and official literature from the 20 years since Canada's most significant sentencing reform (Bill C-41, in 1996). Part II describes developments in three comparator jurisdictions: the US (represented by Minnesota); England and Wales; and Israel. The first two jurisdictions share a common law legal tradition with Canada, and sentencing arrangements are generally comparable – with the important distinction that both employ statutorily binding guidelines. Israel is discussed because it is a good example of 'guidance by words' -- another reform model worth considering in Canada. Part III reviews reform options. This part also identifies the principal barriers to implementation. The document is accompanied by a technical Appendix which contains examples of guidelines, statutory provisions, and other ancillary materials.

I. Problems in Canadian Sentencing

The number of official reports on sentencing and the volume of scholarly commentary suggest problems on which consensus exists. These include:

- High rate of Aboriginal over-representation in prison statistics;
- Over-reliance on custody as a sanction, relative to other western nations;
- Variation in sentencing outcomes;
- Limited guidance regarding the role and use of victim impact statements;
- Lack of clarity as a result of limited guidance regarding issues such as plea-based sentence reductions and mitigating factors at sentencing;
- An out-dated maximum penalty structure in which the maxima bear little relationship to the seriousness of the crimes for which they may be imposed;
- Increased tension between the legislature and the judiciary, as a result of recent mandatory sentencing provisions;
- Absence of gender-specific sentencing considerations;
- Low levels of public confidence in sentencing;
- Lack of comprehensive sentencing statistics.

II. Sentencing Reform in Comparator Jurisdictions

All three of the comparator jurisdictions have structured judicial discretion to a greater extent than Canada. The US is the home of sentencing guidelines. Many US states have adopted formal, presumptively-binding guidelines, with the oldest and best known being the Minnesota guidelines. These follow a two-dimensional grid-based structure. One dimension is crime seriousness: all offences are assigned to one of only nine levels of seriousness. The second dimension is criminal history. Offenders with prior convictions are assigned points for each prior conviction, as well as a number of dimensions of criminal history. Although research has demonstrated a number of positive impacts of the Minnesota guidelines, the grid-based approach has been rejected by other jurisdictions such as Canada and England and Wales.

Sentencing guidelines have been evolving in England and Wales for over a decade now. The English guidelines are administered by a permanent statutory body, the Sentencing Council of England and Wales. The Council's guidelines represent a compromise between the simpler and more restrictive US guidelines and a sentencing framework which accords courts great discretion. Unlike the US guidelines, the English guidelines are offence-specific: all major crime categories (e.g., assault; drugs; sex; theft) have their own bespoke guideline. The guidelines vary slightly in format depending upon the nature of the offence. The general approach of the guidelines is to create a multi-step methodology for courts to follow when determining sentence. The intention is that if all courts follow the same series of steps, sentencing will be more consistent. The limited evaluation research on the English guidelines suggests that they have had a number of salutary effects, although academic criticism has also identified a number of deficiencies.

Israel has pursued a very different route to structuring judicial discretion at sentencing. The Sentencing Law of 2012 creates a methodology (in statute) but does not provide a range of disposals. Instead, the law requires a sentencing court to create *its own* 'Proportionate Sentence Range' (known as a PSR), and then proceed to two important decisions. First, should it depart from what it has defined as the proportionate sentence range in order to pursue the rehabilitation of the offender? Second, in the event that the court elects not to depart from the proportionate range, the statute enumerates factors to be considered in determining where in the range – at the bottom or the top, or somewhere in between. The Israeli statute is in the tradition of countries such as Sweden and Finland which have attempted to promote greater consistency and more principled sentencing by means of a statute alone.

III. Principal reform options for Canada and Barriers to Implementation

1. *Sentencing Guidelines Issued by Independent Statutory Authority*

The most ambitious reform would consist of a national sentencing guidelines scheme, based on some combination of the English and American systems. This would entail creation of a national Sentencing Commission with a mandate to develop and issue statutorily-binding guidelines (as well as other statutory duties). The guidelines would be applicable across the country but with sufficient flexibility to accommodate variation between provinces and territories, and individualisation .... The Commission would be a primarily judicial body, with representatives of all

stakeholders, including prosecutors, the defence bar, victims' and offenders' advocacy groups. It would be modelled on sentencing commissions and councils in other jurisdictions. The guidelines could contain presumptively-binding sentence ranges, or they could be purely advisory in nature.

The international experience suggests that guidelines constitute the most effective and expeditious way to achieve policy goals such as reducing the use of custody for populations that have traditionally been disproportionately represented in prison admissions and populations. A guideline system may be the only effective way of addressing Canada's most intractable sentencing problem, namely the disproportionate numbers of Aboriginals in provincial and federal correctional institutions. For example, a guideline system might contain a separate, national guideline for sentencing Aboriginal offenders.

2. *Judicially-derived and Administered Guidelines*

In some jurisdictions (Canada may be an example), judicial opposition has prevented creation of formal sentencing guidelines. Some judges express the view that a guideline issued by a government sponsored body constitutes a threat to judicial independence and a violation of the principle of separation of powers. A related objection is that guidelines administered by an independent body may lack judicial authority – being derived from a Council or Commission which included non-judicial members. Both objections may be overcome by a scheme in which guidelines are created and administered by the judiciary. This is the approach recently adopted in Uganda and proposed in other jurisdictions. The Ugandan guidelines were developed by a Task force created by the Chief Justice and contain both numerical and narrative elements.

3. *Sentencing Commission without guidelines*

A less ambitious reform involves creation of a Sentencing Commission without the statutory authority to issue guidelines but with a mandate to promote more consistent sentencing and other objectives such as increasing public confidence. This option follows the approach of the Australian sentencing councils.

4. *Statutory Sentencing Reform*

This approach has been adopted in the Scandinavian countries and more recently in Israel. Independent of these potential reforms there would be utility in amending Part XXIII of the Criminal Code to provide greater guidance on a range of sentencing matters, such as the following:

- greater guidance on sentence reductions for a guilty plea;

- guidance on the use of custody as a sanction. For example, Parliament could consider creating statutory criteria which have to be fulfilled before a court may impose a term of custody.

- greater guidance on sentencing Aboriginal offenders – possibly with a separate set of sentencing provisions for this category of offender.

5. *Sentencing Information Systems*

A final alternative to a guidelines scheme would entail creation of a sentencing database for the judiciary to use at sentencing. Sentencers would have access to a range of information which may include:

- Sentences imposed for similar crimes within the same court and province/territory as well as nationally;
- Information about local sentencing alternatives/ treatment programs and options;
- Relevant decisions from the appellate courts;
- Social context information about sentencing (e.g., disproportionate effects of custody on young offenders, female offenders, primary caregivers).

Providing this material to courts may well result in greater harmonization of sentencing and more informed sentencing as courts have ready access to information about aspects of sentencing such as different alternatives to custody.

6. Repeal or Amend Statutory Provisions which Eliminate Judicial Discretion

The options reviewed so far all involve the introduction of some reform. An important alternative involves the repeal or amendment of existing statues. The US may be seen as the home of mandatory sentencing laws; these statutes are most common and more punitive there than possibly any other country with the exception of South Africa. Yet many states have recently moved to repeal or amend their mandatory sentencing laws in order to provide courts with greater discretion at sentencing.

Many of the Canadian mandatory sentences are unique in the sense that they do not permit the degree of judicial discretion necessary to impose a lesser sentence when this is appropriate. Almost all other common law mandatory sentences allow this discretion. For example, the South African mandatories permit a court to impose a lesser sentence. The Criminal Law Amendment Act which created mandatory minimum sentences for a range of offences specifically permits discretion for a judge to impose a lesser sentence when it finds substantial and compelling circumstances". Mandatory minimum sentencing provisions in England and Wales also allow courts to impose a lesser sentence. The threat to proportionality and individualization is not restricted to mandatory minimum terms of imprisonment, as recent commentary has pointed out. Finally, relaxing the mandatory sentencing provisions may well promote public confidence, as a number of surveys have shown greater support for judicial discretion than legislated penalties.

Part I: Overview and Review of Problems in Canadian Sentencing

1.1 Introduction

With respect to criminal justice problems, policy, and practice, Canada is in many respects unique. One important distinguishing feature is that jurisdiction is shared between the federal government and the provinces and territories. This creates a level of complexity not found in unitary jurisdictions such as New Zealand or England and Wales. In addition, a number of problems, such as the high rate of Aboriginal over-incarceration, exist in few other countries. Yet there are still lessons to be learned from the experience elsewhere, although directly importing another jurisdiction sentencing framework or system of guidance is unlikely to prove beneficial. Any reforms introduced from elsewhere would need to be carefully adapted to the Canadian experience. As the Canadian Sentencing Commission noted in the title of its report published almost 30 years ago, what is needed is a "Canadian approach" to sentencing reform (1987). This paper reviews the international experience with sentencing reform and lays out some options for Canada.

1.2 Overview

This paper consists of three parts. Part I identifies the principal problems with sentencing in Canada, drawing on the scholarly and official literature from the 20 years since Canada's most significant sentencing reform (Bill C-41[1], in 1996). Part II describes developments in three comparator jurisdictions: the US (represented by Minnesota); England and Wales; and Israel. These particular comparators have been selected because they employ statutorily binding sentencing guidelines or have recently introduced a comprehensive sentencing statute. Part III reviews the alternative options for reform in Canada, drawing upon the experience in the comparator (and other) countries. This part also identifies the principal barriers to implementing various reform options. The document concludes with a technical Appendix which contains examples of guidelines, statutory provisions, and other ancillary materials.

[1] Bill C-41, *An Act to amend the Criminal Code (Sentencing) and other Acts in consequence thereof.* Ist Session, 35th Parliament, 1997 (Royal Assent July 13 1995) SC 1995, c 22.

1.3 Problems in Sentencing

Determining the problems in Canadian[2] sentencing[3] is to a degree a subjective exercise, yet the number of official reports on sentencing (several of which have reviewed the problems of sentencing)[4] and the volume of scholarly commentary[5] suggest issues on which consensus exists:

- High rate of Aboriginal over-representation in prison statistics and particularly Aboriginal women;[6]
- Over reliance on custody as a sanction, relative to other western European nations[7];
- Unwarranted variation in sentencing outcomes;[8]

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[2] Many of these problems are also found in other jurisdictions. There are of course strengths to the Canadian regime, notably the codification of general sentencing principles. In many other jurisdictions matters are very different. For example, the Law Commission of England and Wales recently launched a Sentencing Code project, and in doing so described current English sentencing law as "an impenetrable thicket, contained in hundreds of separate provisions scattered across dozens of statutes." (2015, p. 2).

[3] This paper focuses on persons sentenced to custody and does not address the high remand population which has contributed to the overall size of the prison population. Yet the use of pretrial detention is an important related problem: the high use of pretrial detention has kept Canada's prison population at a high level.

[4] Chapter 3 of the Report of the Canadian Sentencing Commission (1987) summarizes the problems, many of which remain today (see also Doob, 2011).

[5] For recent commentary see Tonry (2013); Healy (2013); Roberts and Bebbington (2013); Roberts (2012); Doob (2011); earlier publications include Roberts and Cole (1999); Roberts (1998; 1990); Healy and Dumont (1997) and special issues of the *Criminal Law Quarterly* (1999, Volume 42, number 1); *Canadian Journal of Criminology*, (1990, Volume 32, number 3), and *Criminologie*, 1989.

[6] In 2013/14, Aboriginal people represented 24% of all provincial/ territorial admissions to custody, and 20% of federal admissions. In 1998/99, these statistics were respectively, 13% and 18% (Statistics Canada, 2009, Table 3; 2015). The Truth and Reconciliation Commission of Canada identified this disparity, noting that 43% of women sentenced to custody were Aboriginal (Canada, 2015, p. 217). Thus, despite important judgments from the Supreme Court of Canada following the introduction of s. 718.2(e) of the Criminal Code, the problem appears to be getting worse. For discussion of the issue of Aboriginal Peoples more generally and Aboriginal women, see Rudin (2013); Williams (2007).

[7] Canada's prison population of 120 per 100,000 population is higher than many western nations; see Walmsley (2013), Table 4. The Canadian Sentencing Commission identified 'an over-reliance on imprisonment' as one of the problems in sentencing (1987, p. 77). The over-use of incarceration is commonly noted as a problem by academics (e.g., Doob, 2011) as well as the CSC (1987). Although high, the custody rate has been relatively stable since the passage of Bill C-41 in 1996 (see Doob and Webster, 2006).

- Limited guidance regarding issues such as plea-based sentence reductions, and mitigating factors at sentencing;[9]

- Lack of clarity regarding the role of victims at sentencing and the objectives of victim impact statements[10];

- An out-dated maximum penalty structure in which the statutory maxima bear little relationship to the relative seriousness of the crimes for which they may be imposed (and therefore offering little guidance to courts);[11]

- Increased tension between the Executive branch and the judiciary, as a result of mandatory sentencing provisions;[12]

- Absence of gender-specific sentencing considerations[13];

- Low levels of public and victims' confidence in sentencing;[14]

- Lack of comprehensive sentencing statistics.[15]

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[8] This has been a longstanding concern in Canada. Over 50 years ago, a member of the Supreme Court of Canada opened a national seminar on sentencing by noting that: "I do not think it an overstatement to say that not only the public but the Courts and Counsel are disturbed by the apparent inconsistencies between sentences imposed where not only is the crime the same but the surrounding circumstances are, on their face, very similar" (Cartwright, 1964, p. 1). After conducting a thorough review of the literature and surveyed legal practitioners, (including judges) the Canadian Sentencing Commission concluded that: "there is considerable unwarranted variation in sentencing" (1987, p. 77).

[9] S. 718 of the Criminal Code contains a small number of aggravating factors, but no mitigating factors. All other sentencing statutes enumerating sentencing factors provide both aggravating and mitigating factors (see for example, the 2012 Sentencing Law from Israël in the technical Appendix).

[10] See Manikis (2015a).

[11] The Canadian Sentencing Commission observed that "Canada's statutory maxima are inadequate" (1987, p. 63). Specifically, the Commission concluded that "there are two quite separate problems with the current maximum penalties: they are unrealistic and in most cases too high..[and] they are disorderly… Little guidance for anyone can be expected from these maxima" (p. 64).

[12] See Healy (2013).

[13] The differential impact of sentencing on female offenders has emerged as a policy priority in several western nations (see text, and discussion in Gerry and Harris, 2015).

[14] Canadian Sentencing Commission (1987, pp. xxii- xxiii); Cites

[15] Although the Canadian Centre for Justice Statistics (CCJS) has collected court data through the Adult Criminal Court Survey (ACCS) for decades, the survey fails to capture important variables and is subject to a number of data limitations (see text).

One approach to sentencing reform involves devising a specific response to an immediate problem, such as Aboriginal over-representation in prison admissions. However, academic commentators appear to agree that these problems are best addressed through a comprehensive sentencing reform, rather than piecemeal amendments to the *Criminal Code* or other individual initiatives.[16] A wide range of reform options is available, and this paper reviews these in the final section.

[16] The evolution of sentencing reform since 1987 has been characterized by one sentencing expert as only very "ad-hoc" in nature (see Brodeur, 1999). More recently a member of the judiciary characterized recent sentencing reform developments as creating a "conflict between Parliament and the courts.." and described the status quo as a "state of disarray [which] is more profound than any horizon seen before 1996" (Healy, 2013, p. 60).

Part II: Structured Sentencing in Three Comparator Jurisdictions

2.1 Sentencing Reform in Other Common Law Jurisdictions

In recent years, many countries[17] have introduced greater structure at sentencing. Reforms include sentencing guidelines, reform statutes, and sentencing councils or commissions. Structuring judicial discretion at sentencing represents one of the most significant challenges for legislatures. If they prescribe specific sentences – such as mandatory terms of custody – courts are prevented from doing justice by reflecting the individual circumstances of specific offenders. For example, legislating a mandatory sentence of five years imprisonment for an offence means that offenders of very different levels of culpability will receive the same sentence – a clear violation of codified principles of proportionality and restraint. On the other hand, if legislatures leave the courts to regulate themselves at sentencing, outcomes may be too variable, leading to sentencing disparity. In short, there is a fine balance between offering too much and too little guidance.

The potential benefits of legislating guidelines and creating a sentencing commission may be summarised as follows:

- More consistent sentencing between different courts and within the same courts over time. This may be achieved through a combination of offence-specific guidelines; "generic" guidelines applying to all cases (e.g., regarding the application of principles such as totality); guidelines about important sources of information (e.g., victim impact statements) and guidelines about the use of specific sentences such as suspended sentences, intermittent terms of custody or conditional sentences of imprisonment.

- More principled sentencing – for example, helping courts apply important statutory principles such as proportionality and restraint;

- More cost-effective sentencing – by promoting the use of alternatives to custody in appropriate cases;

- Greater focus on victim interests at sentencing – by taking the impact of crimes on victims into account when devising sentence ranges, or through a generic guideline which directs courts to consider victim impact statements;

- Higher levels of public confidence in sentencing; research has demonstrated that people are less critical of courts when they are aware of guidelines (see text).

Sentencing guidelines need not be numerical in nature, providing a specific range of sentence for each crime. A number of Scandinavian countries have

[17] Guidelines or Sentencing Commissions have been introduced or proposed in the U.S., England and Wales; Scotland; Northern Ireland; South Korea; South Africa; Uganda; Kenya; New Zealand; Israel; several Australian states, and China.

developed what may be termed "guidance by words".[18] This involves the legislature placing relatively detailed guidance in a sentencing law. For example, the Swedish Penal Code identifies proportionality as the primary rationale for sentencing, and requires courts to assess the seriousness of the offence in order to determine the sentence. A number of mitigating and aggravating factors are also specified in the Swedish law, in order to guide judges in the determination of sentence. The law also contains guidance for courts regarding the use of different sentencing options. The advantage of the "guidance by words" approach is that it leaves courts with considerable flexibility to determine an appropriate and proportionate sentence (Jareborg, 1995). On the other hand, this may result in greater disparity than would be the case in a jurisdiction such as Minnesota where judges have to follow detailed and prescriptive sentencing guidelines (see below).

Comparator Jurisdictions

The three principal jurisdictions selected for comparison in this paper are Minnesota (representing the US), England and Wales, and Israel. The first two jurisdictions share a common law legal tradition with Canada, and sentencing arrangements are generally comparable[19] – with the important distinction that both employ statutorily binding guidelines. Israel is discussed because it is a good example of "guidance by words" -- another reform model worth considering in Canada.[20] The common element of reforms introduced in all three jurisdictions is that guidance is provided regarding a range of dispositions appropriate to a common case, and courts then exercise their determine sentence within this range or to impose a different sentence. The chief distinguishing feature is the extent of judicial discretion in this respect.

2.1. Minnesota

Sentencing guidelines have been evolving in the United States for over 30 years now, at both the state and federal levels (see Reitz, 2001; Tonry, 2013b). Many states operate a formal sentencing guidelines scheme to assist judges at sentencing. The best-known guidelines model involves a two-dimensional sentencing grid – much

[18] See Ashworth (2009) for discussion of techniques to reduce disparity.

[19] There are important differences aside from the presence/ absence of guidelines. The lower courts (Magistrates' courts) in England and Wales are responsible for imposing approximately 97% of sentences, and at this level almost all sentencing decisions are taken by a panel of lay magistrates. Lay adjudication has almost disappeared from the criminal courts in North America. In addition, prosecutors in England and Wales seldom make sentence recommendations and almost never join with defence counsel in deposing a common sentencing submission. In contrast, "joint submissions" following plea discussions and robust sentence recommendations from both parties are the norm in Canada and the U.S..

[20] Other jurisdictions which have adopted or proposed sentencing guidelines include: South Korea (Park, 2010), Uganda (Kamuzze, 2014) and New Zealand (Young and Browning, 2013). The New Zealand guidelines have yet to be implemented. The New Zealand scheme involves a comprehensive guideline for each offence; the guideline contained categories of crime seriousness, each with an associated range of sentence. A sentencing court would match the case appearing for sentencing to the guideline category using information in the guideline.

like a mileage chart which shows the distance between two cities. The two axes are crime seriousness and criminal history. In order to determine the sentence that should be imposed, a court selects the appropriate level of crime seriousness, and criminal history category. The intersection of the seriousness row and the criminal history column contains a relatively narrow range of sentence length (see Appendix for the current Minnesota Sentencing Grid).[21] Some form of sentencing grid has been adopted in several other states, including Minnesota, Massachusetts; Oregon; Pennsylvania; North Carolina and at the federal level.

Constraint upon Courts: The Departure Test

In states with purely advisory guidelines, the issue of compliance does not arise. One of the well-documented findings however is that advisory guidelines have little impact on sentencing practices at the trial court level (Tonry, 2013b). Some degree of compulsion is necessary, although guidelines vary greatly in the amount of discretion allowed courts. If the guidelines are presumptively binding, the court must impose a sentence within the range found in the guidelines grid. For example, in Minnesota, a court wishing to impose a more (or less) severe sanction than that which is prescribed by the guidelines must first find "substantial and compelling" reasons to justify what then becomes a "departure" sentence, namely one outside the official guideline ranges. Only a minority of sentences imposed fall are outside the guidelines – in the interests of consistency judges are encouraged to remain within the guidelines (see Minnesota Sentencing Guidelines Commission, 2015; Frase, 2005; 2009).

Impact of Minnesota Guidelines

Evaluation research in Minnesota has demonstrated that the introduction of guidelines generated an increase in uniformity and proportionality (see Knapp, 1984; Frase, 2005; Tonry, 1995; 2013b). The positive effects of the Minnesota guidelines include:

- A rapid reduction in racial disparities following introduction of the guidelines;
- A shift in correction admissions resulting in greater offense-based proportionality;
- A stabilising of the prison population due to short-term surges in punitiveness;
- Greater predictability, transparency and clarity in sentencing outcomes.

[21] For example, an offender convicted of a relatively serious crime (e.g., assault, 1st degree) and who has a criminal history score of 4 is subject to a sentence length no less than 104 months and no more than 146 months (see Minnesota Sentencing Guidelines Commission, 2015, p. 73). Courts must impose a sentence within this range or justify a lesser or greater sentence. This example is drawn from the custodial "zone" of the grid, where all sentences involve some period of custody.

Against these benefits, the US grids have been criticized for creating the opposite problem of excessive uniformity in sentencing. This occurs when cases of variable seriousness attract the same sentence.

Despite its popularity across the US, no foreign jurisdiction has adopted the grid-based approach.[22] It is significant that the Canadian Sentencing Commission which existed between 1984 and 1987 and an English Sentencing Commission Working Group reviewed the US schemes and made site visits to several US sentencing Commissions (in 1985 and 2008, respectively). Both bodies ultimately concluded that the grid-based approach was not suitable for Canada or England and Wales.[23] Finally, the US Supreme Court ruling in Booker had the effect of removing the mandatory status of the federal guidelines which are now deemed advisory. It is unlikely that any other jurisdictions will adopt a presumptively-binding US-style grid in the future.

2.3 England and Wales[24]

The era of sentencing guidelines began in England and Wales in 1999 when the Sentencing Advisory Council was created (see Ashworth and Roberts (2013b)). The English guidelines have been steadily evolving since then, and most common offences are now covered by a definitive guideline. In addition, the Council and its predecessors have issued several 'generic' guidelines applicable across all offence categories.[25] The guidelines are developed and issued by a statutory body – the Sentencing Council of England and Wales. The president of the Council is the Lord Chief Justice and there are 14 members,[26] a majority of whom are drawn from the judiciary.

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[22] The other principal US innovation – a statutory body to develop guidelines and possibly perform other functions – has been adopted in many other jurisdictions (see later sections of the essay).

[23] The common objection was that the architecture of a sentencing grid, the quantification of criminal history and the presumptively-binding nature of the guidelines made them unsuitable for sentencing in the two jurisdictions where individualization and discretion were more important considerations.

[24] Although Northern Ireland and Scotland are separate jurisdictions within the United Kingdom, most legislation passed in England and Wales is ultimately also adopted in the other two jurisdictions. In 2015, Scotland announced creation of a Sentencing Council analogous to the Sentencing Council of England and Wales.

[25] For example, to provide guidance regarding the overall seriousness of any offence (Sentencing Guidelines Council, 2004) or the application of the 'Totality' principle when sentencing multiple count cases (Sentencing Council, zzzz).

[26] As with Councils elsewhere, the English Council comprises representatives of all stakeholders in sentencing, including all levels of the judiciary, the Director of Public Prosecutions; a senior police officer; representatives of the probation services and victims' services and the defence bar as well as an academic. A broad membership is necessary to ensure system-wide legitimacy. Commissions which fail to incorporate all interested parties have been heavily criticized (see for example the recent experience with the Tenessee

The English guidelines offer an alternative to a US-style two-dimensional grid. The principal difference is that guidelines in England and Wales promote consistency by requiring sentencers to proceed through a series of steps, rather than by prescribing a range of sentence length and discouraging sentences outside the range (a common approach across the US). The English guidelines contain 9 steps,[27] of which the first two are the most critical. (See Appendix for an extract from the assault guideline). The idea is that if all courts follow the same step-by-step procedure, sentencing decisions across courts should be more consistent.

For the purposes of illustration consider the guideline for *Assault occasioning actual bodily harm.*[28] As with many offences for which a definitive guideline has been issued, ABH has been stratified into three categories of seriousness. The guideline provides a separate range of sentence and starting point sentence for each category. Step One of the guidelines methodology requires a sentencing court to match the case appearing for sentencing to one of the three categories of crime seriousness.[29]

The guideline identifies an *exhaustive* list of sentencing factors which should be used to determine which of the three categories is most appropriate. These factors constitute what the guideline describes as the "principal factual elements" of the offence – such as "a significant degree of premeditation" or "victim is particularly vulnerable". Their importance is reflected in the fact that determination of the category range is the step which will ultimately have greatest influence on severity of sentence. For example, if the court chooses the lowest category, the most severe sentence it should impose is a community based (non-custodial) sentence. In contrast, the next category up has a maximum sentence of 51 weeks imprisonment. Having determined the relevant category range, a court should use the corresponding starting point sentence to move towards a sentence which will then be shaped by the remaining steps in the guideline.

Step Two requires a court to "fine tune" the sentence by considering circumstances which provide "the context of the offence and the offender". The aggravating factors include committing the offence while on bail or licence, while under the influence of drugs, or with abuse of trust. The guideline factors which reduce seriousness (and which result in a less severe sentence) include an absence of prior convictions and the fact that the crime was an isolated incident. A diverse collection of factors is cited as relevant to personal mitigation, including remorse, the fact that the offender was a sole or primary carer and "good character and/ or exemplary conduct".

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[27] In its more recent guidelines the Council has modified this structure, although the essential architecture, namely requiring courts to proceed through an orderly sequence of steps, remains common to all the guidelines.

[28] All English guidelines are available at: http://sentencingcouncil.judiciary.gov.uk/

[29] These categories have been created to reflect gradations in harm and culpability, with the most serious category (1) requiring a court to find greater harm and enhanced culpability. Category 2 is appropriate if either greater harm or higher culpability is present, while Category 3 involves lesser harm and a lower level of culpability.

After Step Two, a court proceeds through the remaining seven steps of the guidelines methodology. Step Three directs courts to reduce sentence in cases where the offender has provided or offered to provide assistance to the prosecution or police. Step Four involves the reduction for a guilty plea. Offenders who plead guilty receive a reduction of up to one third off their custodial sentence (discussed below). The remaining steps relate to other sentencing provisions such as the consideration of any time that the offender spent in remand while awaiting trial. The guideline steps also require the court to give reasons for the sentence imposed, and to explain the effect of the sentence for the benefit of the offender.

Constraint upon Courts: The Departure Test

The English guidelines are less restrictive than their US counterparts, although still formally binding on courts. Section 125(1) of the Coroners and Justice Act 2009 states that:

> "Every court – (a) must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender's case… unless the court is satisfied that it would be contrary to the interests of justice to do so."

Courts may impose a sentence within a wide range and still remain compliant with the guidelines. In this sense, although they are required to follow the guidelines, courts retain considerable freedom to sentence offenders: first, they have considerable discretion within the guidelines; second, they may depart from the guidelines if they believe it is necessary in the interests of justice.

Transparency, Predictability and Consistency

Sentencing guidelines promote greater transparency in sentencing. An example of the benefits of an integrated system of guidance can be found in the issue of plea-based sentence reductions in England. In Canada, there is no statutory basis for these sentence reductions, no guideline, and only limited appellate guidance (Renaud, 2004). In contrast, English courts benefit from three sources of guidance: a statutory provision, a definitive guideline, and judgments from the Court of Appeal. Taken together, these provide structure and clarity without unduly restricting judicial discretion. The statutory foundation is by section 144 (1) of the Criminal Justice Act 2003.[30]

Guidance on the magnitude of reductions is provided by the definitive guideline on sentence reductions which the Sentencing Guidelines Council (SGC).[31]

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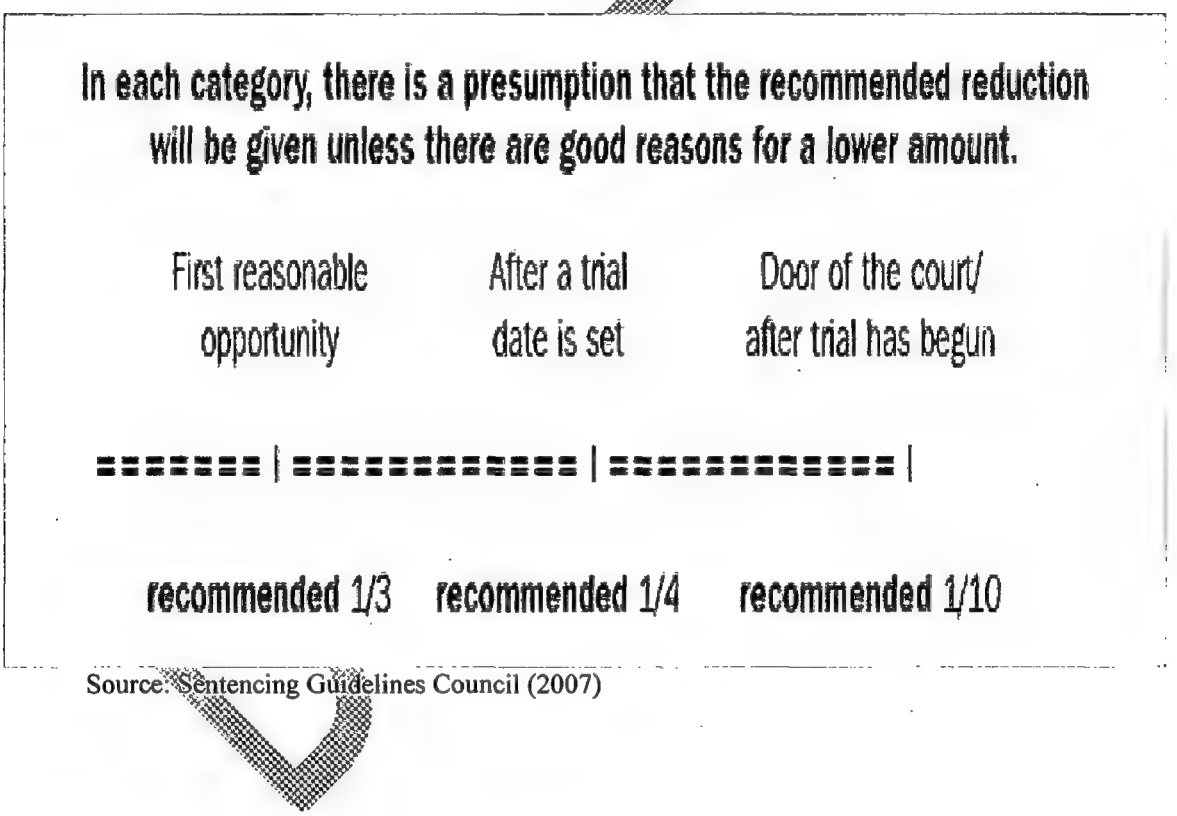
[30] 'In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court must take into account: (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and (b) the circumstances in which this indication was given'.

[31] Although the SGC was replaced by the Sentencing Council in 2010, this guideline remains in force.

The guideline contains a statement of principle justifying these reductions[32] and prescribes specific levels of reduction for different profiles of defendants. If a guilty plea is entered at the first reasonable opportunity, the recommended sentence length reduction is one-third. The size of the sentence reduction then diminishes the later the guilty plea is entered, and the defendant who changes his plea to guilty on the day the trial commences should receive a reduction of only 10% (Sentencing Guidelines Council, 2007).[33] The guideline is neither rigid nor excessively binding; courts retain a degree of discretion in determining the level of reduction awarded.[34] To conclude, the existence of the definitive guideline containing specific reductions appropriate to the stage at which the plea was entered, providing legal counsel and their clients with a clear idea of what reduction to expect (see Figure 1).

Figure 1
Extract from Definitive Guideline for Sentence Reductions for a Guilty Plea



Source: Sentencing Guidelines Council (2007)

[32] This is another benefit of a clear guideline: in Canada, it is unclear whether plea-based reductions are justified because they provide evidence of remorse or because they save witnesses and victims from having to testify (Manson (2001, p. 133; cf Renaud, 2004, p. 152).

[33] This arrangement is consistent with other common law jurisdictions including New Zealand (Law Reform Commission, 2008) and several Australian states (Sentencing Advisory Council, 2015; Torre and Wraith, 2013).

[34] In the latest and most comprehensive guideline judgment on plea-based reductions, the Court of Appeal used the phrase "residual flexibility" to denote the scope of a court to individualise the reduction awarded; see Caley and Ors (guilty pleas); [2012] EWCA Crim 2821.

Empirical research into the correspondence between the recommended levels of reduction and practices in the Crown Court confirm that courts follow the recommendations relatively closely (see below). This means that counsel can advise their clients confident in the knowledge that a particular reduction will be granted, depending on the timing of the plea. Defendants, practitioners, victims, and indeed anyone with an interest in sentencing can be aware of the likely reductions awarded. Although data are unavailable in Canada[35], it is less likely that parties in Canada can predict likely plea-based sentence reductions with such confidence.[36]

Effects of English Guidelines: Evaluation Research

Since the English guidelines have been operational for a shorter period than the US systems,[37] there is less research upon their effects. The Council publishes annual reports containing information on sentencing patterns and departure rates and academic researchers have also explored the effects of the guidelines (see essays in Ashworth and Roberts, 2013a; Roberts, 2015). Taken together, the following conclusions may be drawn:

- Only a small percentage of sentences imposed fall outside the offence specific guideline ranges. In 2014, approximately 5% of sentences imposed for assault were outside the guideline sentence ranges (Sentencing Council, 2015a). This suggests a high degree of conformity with the guidelines. However, the width of the sentence ranges suggests almost all sentences would have fallen in these ranges even without the guideline.[38]

- There is a high degree of concordance between the guideline recommendations for plea-based discounts and trial court sentencing patterns (discussed below; and see Roberts, 2013);[39]

[35] "Plea" is not one of the variables captured by the Adult Criminal Court Survey (ACCS) conducted by the Canadian Centre for Justice Statistics. This omission impedes our understanding of the effects of variables such as plea on sentences imposed and highlights the limitations on sentencing statistics in Canada.

[36] At least it is hard to predict the likely benefit of a plea prior to discussions between the parties. Once these have been resolved the likely sentence is much clearer, as most decisions involve a joint submission to which courts will in normal circumstances defer.

[37] The first offence-specific guideline was issued in 2004 by the former sentencing guidelines authority (the Sentencing Guidelines Council). The number of guidelines began to accelerate once the Sentencing Council issued its first definitive guideline (in 2011).

[38] For example, for the offence of assault occasioning actual bodily harm, the maximum penalty is 7 years custody and the total guidelines sentence range is from a low level fine to three years imprisonment. A court may impose any sentence within this range and remain compliant with the guidelines.

[39] For example, the guideline recommends a one third reduction for pleas entered at the first reasonable opportunity. Recent sentencing statistics reveal that in 2014, 89% of defendants in this category received such a reduction (see Sentencing Council, 2015; Roberts, 2013).

- Research demonstrates the effectiveness of the guidelines in achieving policy objectives: An explicit aim of the Drug Offences guideline was to achieve greater proportionality in sentencing by reducing the lengths of sentences for drug "mules" (relative to dealers). An independent evaluation found that the guideline had reduced the average sentence for this profile of offender, thus making their sentences more proportionate (see Fleetwood, Radcliffe and Stevens, 2015).

- Research on the assault offences guideline demonstrated a modest but significant increase in consistency following introduction of the new guideline (Pina-Sanchez, 2015; Pina-Sanchez and Linacre, 2013);

- Research into public attitudes suggests that knowing about the guidelines has a positive effect upon public attitudes to sentencing (Roberts et al., 2012).

Against this relatively positive picture, it must be added the English guidelines have attracted criticism from a number of constituencies. Some academics have argued that pointed out the very loose nature of the compliance requirement (Ashworth, 2010; 2012), while practitioners have argued that the introduction of the guidelines has had a number of adverse effects such as increasing the severity of sentence and undermining the role of mitigation (e.g., 2; Cooper, 2010; 2013; Lovegrove, 2010). To date, neither the Council nor the Ministry of Justice has conducted empirical research to determine the extent to which these criticisms are valid. This research is necessary if we are to draw definitive lessons from the English experience for other jurisdictions.

Comparing the US and English Guidelines

The relative effectiveness of the two approaches remains unknown, since there has been no comparative analysis. It may be tempting to compare 'departure rates', i.e., the percentage of sentences imposed which fall outside the guidelines. Yet this measure reflects the width of the guidelines ranges. Departure rates are much lower in England than Minnesota principally because the sentence ranges are much wider in the English guidelines. The second principal difference between the English and the US guidelines is that Commissions across the US issue a complete package of guidelines encompassing all offences --- usually, as noted, within a single guidelines grid.[40] The English Council issues guidelines sequentially, for each offence category (such as all assault offences, or drugs crimes). This means that it takes much longer for guidelines to be available for all offences, although much more detailed guidance is provided.

2.4 Israel

Israel is the latest country to structure judicial discretion at sentencing without the adoption of numerical guidelines. The Sentencing Law of 2012 (hereafter SL 2012) creates a methodology for sentencers in a way that echoes the English scheme

[40] For example, in Minnesota, all offences are assigned to one of the nine seriousness levels of the sentencing grid.

yet with important differences, most notably the absence of sentence ranges. The English guidelines create a step by step methodology for courts to follow; each guideline offers a specific sentence range for each level of crime seriousness. The sentence ranges are determined by the English Sentencing Council, based upon judicial practice, decisions from the appellate courts and following a "proportionality review" by the Council to see whether some adjustment is needed.

The Sentencing Law in Israel also creates a methodology (in statute) but does not provide a range of disposals. Instead, the law requires a sentencing court to create *its own* "Proportionate Sentence Range" (PSR), and then proceed to two important decisions. First, should it depart from what it has defined as the proportionate sentence range in order to pursue the rehabilitation of the offender? (The SL 2012 provides guidance as to when such a departure is appropriate.) Second, in the event that the court elects not to depart from the proportionate range, the statute enumerates factors to be considered in determining where in the range – at the bottom or the top, or somewhere in between.

Deviating from the Proportionate Sentencing Range

All guideline schemes permit derogation from a designated or prescribed range, and the Israeli law is no exception. Deviations from a guideline generally fall into one of two categories. Under the US and English guidelines, sentences outside the guideline range may be imposed in response to exceptional case characteristics. When these arise, a court departs from the guideline and provides reasons why a departure was necessary. Deviations may also arise when a court sees great potential for rehabilitation. If the court determines that there is a "serious likelihood" that the offender will be, or has already been rehabilitated, it may depart from the proportionate range and order him or her to adopt some rehabilitative action.

However, this does not create a blank cheque for courts to overrule proportionality in pursuit of rehabilitation; a proportionality restriction applies to the more serious cases. If the crime is "exceptionally severe" or if the offender's level of culpability is "exceptionally high", the court may activate this ground for departing from the PSR but only when unusual and extraordinary circumstances exist. In other words, deviation from the PSR is still possible in these more serious cases, but the threshold for deviating is raised. This restriction will work to ensure that the rehabilitation does not readily undermine proportional considerations which gave rise to the PSR in the first place.

In short, the Sentencing Law creates an explicit methodology to be followed by courts when determining sentence (see Roberts and Gazal-Ayal (2013)). The law requires a court to create a Proportionate Sentence Range appropriate to the case at bar, and then to consider whether it should depart from the range in the interests of rehabilitation. The law provides lists of the relevant factors related to the offence as well as legitimate factors to be considered unrelated to the offence – but related to the offender or the wider interests of justice.

This novel approach to structuring judicial discretion without restricting courts to a specific range of sentence is based upon Scandinavian penal codes but goes much further than these other statutes in providing comprehensive guidance. The important

difference between this approach and the guideline schemes is that here the aim is to promote proportionality and consistency within a particular sentencer's decisions over time, rather than between courts or judges. (A translation of the Sentencing law can be found in the Appendix). To date, there has been no published evaluation of the new sentencing law.

Conclusion

What have we learned about the experience with structuring sentencers' discretion outside the United States? A number of lessons can be drawn. First, the Sentencing law in Israel suggests that *numerical* guidelines are not necessarily the only model to follow. It is possible to provide guidance to courts without prescribing specific sentencing ranges in terms of time in prison.

Second, the English and New Zealand guidelines demonstrate that there is a middle ground between the relatively tight sentencing guidelines found across the United States and the looser systems of "guidance by words" found in countries like Sweden, Finland and Israel. These more recent guidelines offer a system which is prescriptive and yet very flexible in application. These systems offer a plausible improvement upon the more discretionary sentencing arrangements found in countries like Canada, South Africa, and India.

Third, judicial acceptance of greater structure (and reduced discretion) is far more likely when the judiciary are heavily implicated in the development and evolution of the guidelines. The statutory bodies responsible for developing the guidelines in England and Wales have generally been dominated by the judiciary. The Canadian Sentencing Commission proposals appear to have failed in the 1980s, in part at least because judges perceived the guideline scheme to be a bureaucratic scheme which threatened the independence of the judiciary and compromised the ability of sentencers in Canada to individualise sentencing.

Fourth, there may be an advantage to the gradual evolution of guidelines. The English guidelines have been slow to develop – with guidelines for specific offences issued periodically over the years rather than in one step as was the case in the United States, or the proposals advanced in New Zealand. There was no "big bang" to the English experience in the sense of a comprehensive guidelines package covering all offences. In retrospect, this potential weakness of the guidelines may paradoxically have ensured their survival and development. They have evolved incrementally from their modest origins in 1999 (see Ashworth and Roberts, 2013b). Judges who may initially be resistant to attempts to curb their discretion may be more likely to accept guidance when it evolves in this way.

Part III Options for Canada

This final section reviews the principal reform options for Canada and identifies a number of barriers to implementing sentencing reform. A brief paper can only sketch the outline of specific options; each option would require careful study and consideration.

5. *Sentencing Guidelines Issued by Independent Statutory Authority*

The most ambitious reform would consist of national sentencing guidelines[41], based, possibly on a modified version of the English or New Zealand systems.[42] As noted at the beginning of this paper, any guideline scheme would need to be adapted to the Canadian sentencing framework and culture. Any guideline scheme would require a national Sentencing Commission with a mandate to develop and issue statutorily-binding guidelines (as well as other statutory duties). The guidelines would be applicable across the country but with sufficient flexibility to accommodate variation between provinces and territories.[43] The Commission would be a primarily judicial body, with representatives of all stakeholders, including prosecutors, the defence bar, victims' and offenders' advocacy groups.[44] It would be modelled on sentencing commissions and councils in other jurisdictions (see von Hirsch et al., 1987; Freiberg and Gelb, 2008).[45] The guidelines could contain presumptively-binding sentence ranges, or they could be purely advisory in nature.

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[41] For examples of the guidelines proposed by the Canadian Sentencing Commission, see Appendix F of the Commission's Report (1987). For information on sentencing commissions and their guidelines in the US, see von Hirsch et al. (1987).

[42] Since these guidelines offer greater flexibility to courts and would therefore be more appropriate for the Canadian context.

[43] This proposal is consistent with the recommendations of the Canadian Sentencing Commission (1987) and the House of Commons Standing Committee on Justice and Corrections (also known as the Daubney Committee, after its chair, David Daubney, M.P.; see Canada, 1988) as well as academic commentators. The Sentencing Commission recommended an integrated reform which was not a rigid grid-based model like that used at the federal level in the US, but nor was it a "guidance by words" system like those used in certain Scandinavian countries. In important respects, the Daubney Committee report and the Canadian Sentencing Commission were in agreement. For example, the House of Commons report also recommended that Canada adopt sentencing guidelines, albeit of an advisory nature, and both bodies also advocated the creation of a permanent sentencing commission.

[44] Some Sentencing Councils also contain members of the general public. For example, the New South Wales Sentencing Council has four members representing the 'general community' (see New South Wales Sentencing Council, 2014).

[45] Canada is anomalous in another respect of relevance to this issue. Almost all common law jurisdictions benefit from a Law Commission. Prior to its abolition the Law Commission of Canada produced a number of seminal documents in the area of sentencing. As noted the Law Commission of England and Wales has just launched a sentencing initiative. The absence of a Law Commission means that there is a vacuum in terms of the development of sentencing reform proposals; the need for a Sentencing Commission is therefore more pressing than it would otherwise be.

The international experience suggests that guidelines are the most effective and expeditious way to achieve policy goals such as reducing the use of custody for populations that have traditionally been disproportionately represented in prison admissions and populations. A guideline system may be the only effective way of addressing Canada's most intractable sentencing problem, namely the disproportionate numbers of Aboriginals in provincial and federal correctional institutions. For example, a guideline system might contain a separate, national guideline for sentencing Aboriginal offenders.[46] This could include information about Aboriginal communities, sentencing options appropriate to Aboriginal offenders, and possibly separate sentencing purposes and principles.

How would a country go about creating a sentencing guidelines scheme? The first step involves the creation of an independent authority to develop sentencing guidelines. Twenty years ago a leading international scholar wrote that: "The sentencing Commission is alive and well." (Tonry, 1995, p. 25). And so it is, both in the US and abroad. All US guidelines schemes have emerged from a sentencing commission, such as the Minnesota Sentencing Guidelines Commission.[47] In other countries these bodies are usually called Sentencing Councils, and there is significant variation in their structures and functions. The Sentencing Council of England and Wales is tasked with devising and disseminating guidelines as well as a range of other functions (see Roberts, 2011). The technical Appendix contains an extract from the Coroners and Justice Act 2009 which specifies the Council's duties and functions other than those relating directly to the creation of guidelines.

Other sentencing councils such as the Sentencing Advisory Council in New South Wales[48] are only advisory in nature; they do not issue sentencing guidelines but simply provide advice and conduct research upon a wide range of sentencing issues. All sentencing councils – to a greater or a lesser extent - are involved in public legal education of one kind or another. This may mean publishing reports to help the public understand the sentencing process better, or it may mean releasing comprehensive sentencing statistics. For example, the Council in NSW publishes periodic Sentencing Bulletins which summarise sentencing trends for specific offences.[49]

Enhancing the Role of the Victim at Sentencing

Guidelines and Commissions can do much more than simply promote greater consistency in sentencing. A comprehensive guideline system has the potential to promote the interests of the crime victim in a balanced and consistent way. In Canada, the provinces and territories have for many years operated victim impact statement

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[46] In other jurisdictions proposals have been advanced for a separate guideline for female offenders, on the same reasoning, namely that they represent a very different offender population (see Gerry and Harris, 2015).

[47] See http://mn.gov/sentencing-guidelines/

[48] See http://www.sentencingcouncil.justice.nsw.gov.au/

[49] See http://sentencingcouncil.vic.gov.au/page/about-us/council. These bulletins serve more than just a public information function; the judiciary also cite them in their judgments.

schemes. These statements have a robust statutory foundation, and the VIS provisions in the Criminal Code go further than analogous regimes in other common law countries. Most recently, s. 15 of the Victims Bill of Rights states that:

> Every victim has the right to present a victim impact statement to the appropriate authorities in the criminal justice system and to have it considered.

However, even the most robust and well implemented VIS regime will have limited success unless statements are used appropriately by courts. Sentencing commissions and guidelines can facilitate the effective and appropriate use of Victim Statements at sentencing in several ways. Once again, there are lessons from foreign jurisdictions.

First, victim interests are incorporated into the offence-specific guidelines in England. Thus factors relating to the victim appear at both Stage One and Two of the guidelines. For example, Step One of the Assault guideline includes several victim-related factors such as "deliberate targeting of vulnerable victim" and "victim is particularly vulnerable". Step Two includes other factors relating to the victim, including "ongoing effect [of the crime] on the victim" and "gratuitous degradation of the victim". If the court finds one or more of these factors as being present at this step, the case will be assigned to a higher category of seriousness (see Sentencing Council, 2013; Edwards, 2012). The English Council also publishes a Bulletin for Crime Victims, which describes the ways that the guidelines incorporate victim interests.[50]

Second, the New Zealand guidelines go a step further: they include a stand-alone "generic" sentencing guideline which assists courts in taking impact statements into account at sentencing. Without such a guideline, courts are likely to use victim impact statements in different ways.[51] Finally, most Sentencing Commissions and Councils around the world include a member who represents crime victims.[52] Similar initiatives in Canada would supplement the existing, but limited guidance from the courts.[53]

6. Judicially-derived and Administered Guidelines

In some jurisdictions, judicial opposition has prevented creation of formal sentencing guidelines. Judges sometimes express the view that a guideline issued by a government sponsored body constitutes a threat to judicial independence and a violation of the principle of separation of powers. A related objection is that guidelines administered by an independent body may lack judicial authority – being derived from a Council or Commission which included non-judicial members. Both

[50] http://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing_Guidelines_and_Sentencing_in_England_and_Wales-Victims_of_Crime.pdf

[51] See Manikis (2015a); Manikis and Roberts (2012).

[52] For example, the Chief Executive of Victim Support (the principal victim services agency in England and Wales) is a member of the English Sentencing Council.

[53] See Manikis (2015a; 2015c).

objections may be addressed by a scheme in which guidelines are created and administered by the judiciary. This is the approach recently adopted in Uganda and proposed in other jurisdictions. The Ugandan guidelines were developed by a Task Force created by the Chief Justice. The guidelines contain both numerical and narrative elements (see Kamuzze, 2014). A relatively wide range of sentence and a starting point sentence is provided for each offence. For example, theft carries a maximum penalty of 10 years imprisonment and has a guidelines range from one to 10 years and a starting point of 5 years. Since the guidelines have been in operation for only a short period, evaluation research has yet to be conducted.

Another alternative relating to the judiciary entails greater guidance from the courts of appeal. If the apex courts, including the Supreme Court of Canada, were to issue more (and more detailed) guideline judgments, this would fill some of the void in terms of guidance for sentencers. There is of course a tradition of guideline judgments in Canada which can be traced back decades. Appellate guideline judgments might contain 'Starting Point' sentences which would furnish first instance courts with a common point of departure at sentencing. However, since the appellate courts are essentially reactive in nature, ruling on specific cases brought by the parties on appeal, this is a less systematic way of generating guidance for trial courts.

7. *Sentencing Commission without guidelines*

A less ambitious reform involves creation of a Sentencing Commission without the statutory authority to issue guidelines but with a mandate to promote more consistent sentencing and other objectives such as increasing public confidence. This option follows the approach of the Australian sentencing councils. An independent Commission could assist by:

- Depoliticising sentencing policy; the Commission could conduct research, canvass stakeholders and then advise Parliament or the federal Department of Justice with respect to specific reform proposals (see below);
- Promoting greater consistency through publishing offence-specific bulletins of sentencing trends and other sentencing-related information;
- Enhancing public understanding of sentencing through a variety of initiatives;
- Providing information to victims about the sentencing process.[54]

Evidence of the utility of such Councils can be found in the independent review of the Sentencing Advisory Council (SAC) of Victoria. The report was commissioned by the NSW Department of Justice and concluded that the "SAC is a highly effective and successful organization that represents value for money for the Victorian Government" (2008, p. 3). (This is the only published evaluation of a sentencing Council).

[54] A good example is the sentencing information package published by the New South Wales Sentencing Council (2013).

8. *Statutory Sentencing Reform*

Here the intention is to provide greater guidance through a comprehensive set of statutory provisions. As noted this approach has been adopted in the Scandinavian countries and more recently in Israel. Independent of these potential reforms there would be utility in amending Part XXIII of the Criminal Code to provide greater guidance on a range of sentencing matters, such as the following:

- The most important mitigating factors at sentencing[55] including greater guidance on the appropriate sentence reductions for a guilty plea. An example of the benefits of greater clarity regarding plea discounts can be found in the State of Victoria, where section 6AAA of the Victorian Sentencing Act 1991 requires sentencing judges to reveal explicitly the stated reduction or discount.[56]

- More guidance on the use of custody as a sanction. For example, Parliament could consider creating statutory criteria which have to be fulfilled before a court may impose a term of custody;[57]

- greater guidance on sentencing Aboriginal offenders – possibly with a separate set of sentencing provisions for this category of offender.

Focus on Aboriginal Over-Incarceration

As noted earlier, the rate of Aboriginal incarceration has remained high; the remedial provision codified in 1996 has clearly failed to achieve the objective of reducing Aboriginal admissions to custody. Inadequate implementation of the *Gladue*[58] and *Ipeelee*[59] judgments across the country is one possible explanation for this failure. In the context of the present paper, however, it is worth asking whether additional statutory reforms might be useful. In light of the failure of s. 718.2(e) or the

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[55] Courts may benefit from guidance as to the most important mitigating factors, as acknowledged by prosecutors as well as defence counsel (Sentencing Council, 2015, p. 27). This is why sentencing statutes around the world include both types of factors. At present, courts may interpret factors in different ways or assign variable weights to sentencing factors. For example, in some jurisdictions courts consider the absence or remorse to aggravate; elsewhere remorse mitigates but its absence has no effect. Similarly, a common appeal in mitigation is that the offender acted out of character due to intoxication yet in other contexts (and in some guidelines) intoxication is taken as a categorical aggravator (see Padfield, 2011; Roberts, 2011).

[56] As the Victoria Sentencing Advisory Council recently noted: "Requiring sentencing judges to articulate the effect of the guilty plea on sentence was intended to increase transparency" (2015, p. xv).

[57] This approach to restricting the use of custody was adopted in the Youth Criminal Justice Act (YCJA). Evaluation research upon the impact of the YCJA has demonstrated a significant reduction in the use of custody in youth courts (see Bala et al., 2009; 2010).

[58] *R v Gladue* [1999] 1 SCR 688 (SCC).

[59] *R v Ipeelee* [2012] 1 SCR 13 (SCC).

subsequent SCC judgments to effectively reduce Aboriginal admissions to custody, a more radical approach is clearly necessary.

This challenge is particularly pressing in light of the Truth and Reconciliation Commission's call to eliminate the overrepresentation of Aboriginal people in custody 'over the next decade' (Canada, 2015, p. 219). It will clearly take more than a modest provision such as s. 718.2(e) to accomplish this objective. It has also been argued that the expansion of the Gladue framework to other branches of the criminal justice system is necessary in order to effectively address Aboriginal over-representation in prison statistics.

Section 718.2(e) has attracted both advocates critics over the years. However, there appears to be consensus that a modest reference[60] to the importance of considering Aboriginality at sentencing is unlikely to change trial practices. And so it has proved. In this respect the international experience supports the need for a more systematic or ambitious solution. In New Zealand a legislative provision which was inspired by concerns about Maori over-incarceration permits courts to consider an offender's Maori background, yet the problem remains.[61] In this sense the international experience is of no assistance; what is needed is a uniquely Canadian response. What then are the alternatives?

- In the event that national guidelines are developed, guidance could be offered regarding the application of these guidelines to Aboriginal defendants;
- If the intention is to directly reduce admissions to custody, Parliament could legislate specific criteria which must be fulfilled before an Aboriginal offender is committed to custody;
- Creating separate Aboriginal-relevant sentencing principles and specific sentencing options tailored to Aboriginal communities and cultures; these would echo but be different from those currently found in Part XXIII;
- Creation of a stand-alone sentencing Code for Aboriginal offenders; this would result in a separate regime for Aboriginal offenders.

5. *Sentencing Information Systems*

A final alternative to a guidelines scheme would entail creation of a sentencing database for the judiciary to use at sentencing.[62] Sentencers would have access to a range of information which may include:

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[60] A simple statutory reference that courts should consider all reasonable alternatives "with particular reference to Aboriginal offenders" may be likened to a "touch of the tiller"; what is needed is a more radical change.

[61] Jeffries and Stenning (2014) report that the age standardized rate imprisonment rate was three times higher for Maori than for all New Zealanders.

[62] This recommendation needs to be considered in light of the state of sentencing information currently available across the country. It is my understanding that in some provinces, courts have databases available to them which summarise recent, relevant trial and appellate

- Sentences imposed for similar crimes within the same court and province/territory as well as nationally;

- Information about local sentencing alternatives and treatment programs and options;

- Relevant decisions from the appellate courts;

- Social context information about sentencing (e.g., disproportionate effects of custody on young offenders, female offenders, primary caregivers and older offenders).

Providing this material to courts may well result in greater consistency and more evidence-based sentencing as courts have ready access to information about aspects of sentencing such as different alternatives to custody. Two pioneering, early projects in Canada trialled such a system. Both systems demonstrated the potential of computerised information and at a much earlier period when personal computers were still a novelty (see Doob and Park, 1987). Ultimately, both projects failed to be implemented on a permanent basis.

More recently, a sentencing information system (SIS) was created in Scotland, but fell into disuse and there are no plans to resuscitate the system (Hutton and Tata, 2010). It is likely that the newly-created Scottish Sentencing Council will follow the lead of its English counterpart and initiate new data collection in the High Court. Japan is an example of a country that has developed a sentencing database for the courts at sentencing. Japanese courts can access comparable cases based on important case characteristics such as the number of crime victims or the presence and nature of any weapon used. As was the case with the Scottish system, the Japanese version is closed to the public. Finally, it is purely advisory in nature and has no binding force on the courts (Shiroshita, 2010).

The National Judicial Institute (NJI) is an obvious potential partner in the creation of a sentencing information system (through some form of Benchbook) or even as the agency mandated to develop judicially-created sentencing guidelines. The NJI has long provided educational resources to judges for a wide range of judicial functions, and sentencing has been a core component for several years (see National Judicial Institute, 2014).

7. Repeal or Amend Statutory Provisions which Eliminate Judicial Discretion

The options reviewed so far all involve the introduction of some reform. An important alternative involves the repeal or amendment of some mandatory sentencing statutory provisions. Mandatory sentencing is on issue on which great consensus exists; academics and judges generally agree that mandatory sentences prevent or impede a court from crafting a just disposition. Many of the statutory amendments since the passage of Bill C-41 are hard to reconcile with the principles of

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decisions. If such systems do exist, there is the potential for them to be standardized across the country and made available to a wider constituency of "users", including advocates.

proportionality and restraint codified in that Act; mandatory sentences which require a court to impose a specific sentence in all cases violate both of these principles.

The US may be seen as the home of mandatory sentencing laws; these statutes are more common and more punitive there than possibly any other country with the exception of South Africa. Yet many states have recently moved to repeal or amend their mandatory sentencing laws in order to provide courts with greater discretion at sentencing (see Department of Justice, 2003). The 2015 Presidential exercise of clemency in the case of offenders sentenced under mandatory drug sentencing laws is one example of this trend. There is a growing acceptance that mandatory sentencing laws have failed, and at great cost (see Mauer, 2009).

Many of the Canadian mandatory sentences are unique in the sense that they do not permit the degree of judicial discretion necessary to impose a lesser sentence when this is appropriate. Almost all other common law mandatory sentences allow this discretion. For example, even the punitive South African mandatories permit a court to impose a lesser sentence. The Criminal Law Amendment Act in South Africa which created mandatory minimum sentences for a range of offences specifically permits discretion for a judge to impose a lesser sentence when it finds "substantial and compelling circumstances".[63] Mandatory minimum sentencing provisions in England and Wales also allow courts to impose a lesser sentence.[64] The threat to proportionality and individualization is not restricted to mandatory minimum terms of imprisonment, as recent commentary has pointed out.[65] Finally, relaxing the mandatory sentencing provisions may well promote public confidence, as a number of surveys have shown greater support for judicial discretion than legislated penalties.[66]

How might the Canadian mandatories be made more flexible? Two possibilities are:

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[63] In *S v Malgas* the Supreme Court of Appeal decided that if the prescribed sentence would result in an injustice, this would amount to a substantial and compelling circumstance for the purposes of the Act.

[64] When sentencing an offender for a qualifying third domestic burglary the court must apply Section 111 of the Powers of the Criminal Courts (Sentencing) Act 2000 and impose a custodial term of at least three years, '*except where the court is of the opinion that there are particular circumstances which (a) relate to any of the offences or to the offender and (b) would make it unjust to do so in all the circumstances*'. (emphasis added).

[65] In Canada, the enactment of a provision in the Increasing Offenders' Accountability for Victims Act removes the discretion that judges previously exercised to exempt an offender from the payment of the Victim Fine Surcharge in cases where the imposition of the surcharge would impose undue hardship (see Healy, 2013).

[66] For example, regarding the controversial practice of according credit for pre-trial custody, research demonstrated that "support was higher for providing judges discretion than instituting a standard response" (Department of Justice Canada, 2007, p. 22). For a review of research on public attitudes to mandatory sentencing see Roberts (2003).

- Creating a general judicial discretion clause which would allow courts to circumvent the mandatory sentence in cases where imposing the mandatory sentence would be contrary to the interests of justice or

- Creating a provision which would allowing a court to impose a lesser sentence when the case contains one or more important mitigating factors.

Potential Challenges to Implementation

Costs

Cost is one obvious impediment to the establishment of a Sentencing Commission. This issue was raised in the 1980s during consultation on the recommendations of the Canadian Sentencing Commission, and is even more likely to arise now, during a period of financial austerity. Two responses may be offered to address this objection.

First, Sentencing Commissions are generally modest units, usually with part-time Commissioners and only a small permanent staff. The budgets of foreign bodies offer a guide to the likely cost of a Canadian version. The Minnesota Sentencing Commission currently costs approximately Can $600,000 per annum, and the Sentencing Advisory Council in Victoria around $1.6 million per annum. Even the English Council which has a much wider range of statutory duties (and research obligations) than other Commissions operates within an annual budget of less than $2 million.[67] These are relatively modest amounts[68] in terms of the overall budget for court services.

Second, a well-functioning Sentencing Commission would generate offsetting cost savings through a number of ways, consistent with the experience in other jurisdictions. For example, one goal of the English timing-based plea reduction guideline is to ensure that if a defendant elects to plead guilty this decision is taken early in the process, thus saving court time and witnesses and victims from having to testify. A clear guideline should result in more "first appearance" pleas – fewer later pleas and "cracked trials" (where the plea is entered only on the day of trial). Another source of savings involves the greater use of alternatives to custody; if guidelines – advisory or presumptive – result in increased use of noncustodial sanctions this will reduce correctional expenditures, particularly at the provincial/ territorial level. Finally, it is worth noting benefits arising from a Sentencing Commission which can be directly costed, such as greater public awareness of sentencing.

Judicial Reaction and the Importance of Judicial Engagement

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[67] The Canadian Sentencing Commission estimated in 1987 that a PSC would cost approximately $1 million; in today's values this is more likely to be $2 million.

[68] Of course the cost of any Commission will depend on its size, the frequency that it holds meetings and its ambit of duties. The Minnesota Commission meets relatively infrequently and has a rather limited range of functions. In contrast the English Council meets every month and has a wide range of duties (see Appendix).

It is unlikely that substantive sentencing reform could be implemented without the active co-operation of the judiciary. A degree of judicial opposition to the recommendations of the Canadian Sentencing Commission was a factor in the decision to legislate only certain elements of the Commission's reform package (Doob, 2011). In other jurisdictions, judicial opposition has been a factor in preventing substantive sentencing reform.[69] Trial courts may be concerned that their ability to individualise the sentence may be compromised; appeal courts may feel their jurisdiction to issue guidelines is under threat. Both of these perceptions are understandable, but can be addressed by pointing to the English experience.

As noted, the English judiciary has traditionally been sceptical regarding any sentencing reform which constrains judicial discretion. However, the English guidelines have been accepted by all levels of the lay and professional judiciary. In addition, the Court of Appeal, Criminal Division has continued to issue important guideline judgments. The Council's definitive guidelines therefore supplement rather than supplant guidance from the Court of Appeal.[70]

The most important lesson for any jurisdiction contemplating sentencing reform and in particular guidelines concerns the need for judicial input and support. The international experience demonstrates that judicial co-operation is essential.[71] Judicial opposition is likely to arise if the guidelines are presumptively-binding; contain overly restrictive sentence ranges, discourage departures from the guidelines in appropriate cases or apply sentencing factors such as prior convictions in relatively mechanistic ways. On the other hand, in recent years the judiciary in several common law countries has proved amenable to more structured sentencing when the reforms are developed in consultation with the courts. A useful research project would be to conduct a systematic survey of the Canadian judiciary, with a view to better understanding judicial perceptions of the current problems in Canadian sentencing as well as the most appropriate solutions to those problems.[72]

The Politics of Sentencing

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[69] One example of this from England and Wales is a recommendation by an Advisory Panel to rationalise and lower the maximum penalties (Advisory Council on the Penal System, 1978). Judicial opposition prevented this reform from taking place and the maxima in that jurisdiction (and Canada) remain unreliable guides to the relative seriousness of the crimes for which they may be imposed. This was one of the problems identified by the Canadian Sentencing Commission (1987).

[70] A good example of this co-operation rather than competition can be found in the area of guilty pleas, where the definitive guideline has been endorsed and interpreted by the Court of Appeal, see text.

[71] Thus, in England the Lord Chief Justice serves as the President of the Sentencing Council. The Lord Chief and members of the Court of Appeal have long played an integral role in the development of the guidelines. One reason for this level of support is that the Court of Appeal has retained its powers to issue guideline judgments, even if these generally also acknowledge the existence of the definitive guidelines issued by the Council.

[72] The last national judicial survey was conducted 30 years ago by the Canadian Sentencing Commission (Roberts, 1988).

Legislative or political opposition may also represent a barrier to rational and comprehensive sentencing reform. Some Parliamentarians may believe the creation of a statutory, permanent body would erode their jurisdiction to legislate sentencing policy. It is a misperception; in all countries where a Commission or Council exists, Parliament has continued to legislate reforms, and appellate courts have continued to issue guideline judgments. Parliamentarians may well recognise that there are benefits to creating an expert body which can devise guidelines and provide the federal legislature with expert advice on potential reforms. The English Council illustrates the potential advantages.

The enabling legislation clearly establishes a relationship between the Council and both the Lord Chancellor and the Court of Appeal. Thus both may propose to the Council that it create or revise particular guidelines.[73] In addition, the House of Commons Justice Select Committee is one of the statutory consultees with respect to draft guidelines, and the Chairman of the Sentencing Council appears periodically before this committee to report on the Council's activities. Finally, the existence of an independent, primarily judicial and statutory sentencing authority may help to depoliticise the debate about sentencing policy in Canada. Penal populism is a well-documented threat to informed, evidence-based sentencing reform. This arises when political parties compete for the support of the electorate by promoting punitive criminal justice reforms (see Pratt, 2007). The creation of a Commission or Council has been recommended in other jurisdictions as a way of insulating the courts and the policy-making process from populist pressure (see Lacey, 2008, pp. 191-192).

Federal-Provincial Relations

Perhaps the greatest challenge to reform in Canada involves the federal-provincial divided jurisdiction. Unitary jurisdictions such as Israel or England and Wales do not have to confront this challenge. It is unlikely that the federal government will proceed with significant sentencing reform in the face of provincial or territorial opposition. Yet this particular barrier may be overcome if it were accepted by the jurisdictions that the existence of a federal Commission and national guidelines would not affect, or even reduce court and/ or correctional costs.

Conclusion

In an era in which most countries are moving towards a more structured sentencing environment which enhances transparency and consistency, Canada is becoming increasingly anomalous. This survey of international developments has shown that there is a now a wealth of comparative experience and scholarship on which to draw.[74] In addition, after more than a decade of study and consultation with practitioners and other stakeholders, the American Law Institute's Model Penal Code project has recently released its final Sentencing and Release model Set of

[73] Coroners and Justice Act 2009, s. 124.

[74] For further discussion of sentencing guidelines and sentencing across common law jurisdictions see Northern Ireland Assembly (2011); Roberts and Baker (2008) and Roberts (2012).

provisions.[75] This consists of a comprehensive, detailed and integrated set of provisions which serves as an authoritative model for other jurisdictions, including Canada.

Exactly 30 years ago in 1985, the Sentencing Commission conducted the first thorough, national consultation with all principal stakeholders in the area of sentencing (see Canadian Sentencing Commission, 1987, Chapter 1). Much has happened in the field of sentencing since then, including of course Bill C-41 and the many amendments introduced over the past decade. Perhaps the time has come for another such consultation, with a view to establishing the most pressing problems as well as the most appropriate remedies.

[75] See American Law Institute for Model Penal Code: Sentencing. Draft No. 11 at https://www.ali.org/.

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Technical Appendix

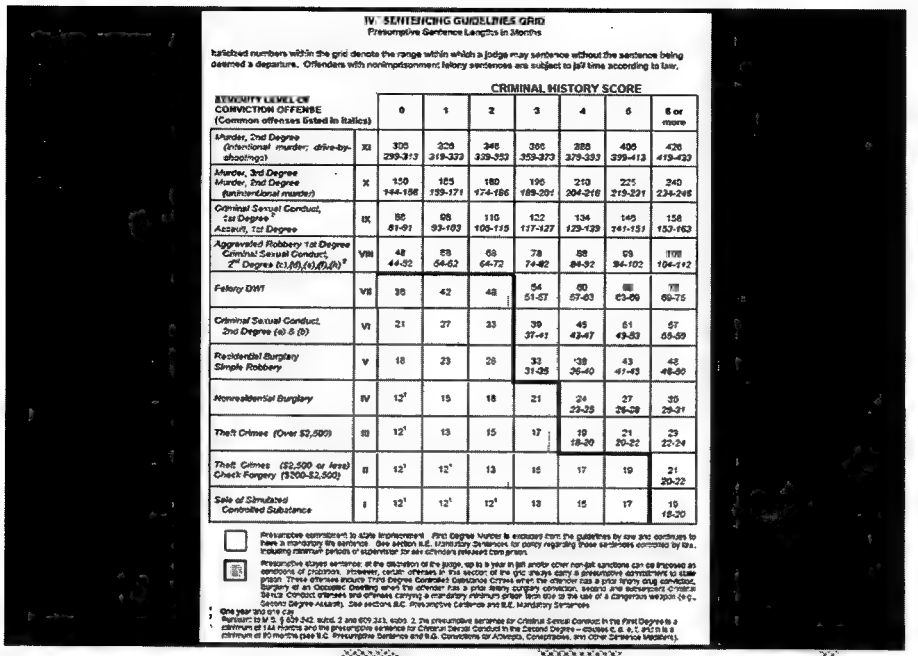
A: Sentencing Grid, Minnesota Sentencing Guidelines Commission

B: Extract from the Sentencing Act (Israel)

C: Extract from Definitive Assault Offences Guideline (England and Wales)

D: Other Statutory Duties of the Sentencing Council

A: Sentencing Grid, Minnesota Sentencing Guidelines Commission



IV. SENTENCING GUIDELINES GRID

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure. Offenders with nonimprisonment felony sentences are subject to jail time according to law.

SEVERITY LEVEL OF CONVICTION OFFENSE (Common offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
Murder, 2nd Degree (intentional murder; drive-by-shootings)	XI	306 *299-313*	326 *319-333*	346 *339-353*	366 *359-373*	386 *379-393*	406 *399-413*	426 *419-433*
Murder, 3rd Degree Murder, 2nd Degree (unintentional murder)	X	150 *144-156*	165 *159-171*	180 *174-186*	196 *189-201*	210 *204-216*	225 *219-231*	240 *234-246*
Criminal Sexual Conduct, 1st Degree [2] Assault, 1st Degree	IX	86 *81-91*	98 *93-103*	110 *105-115*	122 *117-127*	134 *129-139*	146 *141-151*	158 *153-163*
Aggravated Robbery 1st Degree Criminal Sexual Conduct, 2nd Degree (c)(d)(e)(f)(g) [3]	VIII	48 *44-52*	58 *54-62*	68 *64-72*	78 *74-82*	88 *84-92*	98 *94-102*	108 *104-112*
Felony DWI	VII	36	42	48	54 *51-57*	60 *57-63*	66 *63-69*	72 *69-75*
Criminal Sexual Conduct, 2nd Degree (a) & (b)	VI	21	27	33	39 *37-41*	45 *43-47*	51 *49-53*	57 *55-59*
Residential Burglary Simple Robbery	V	18	23	28	33 *31-35*	38 *36-40*	43 *41-45*	48 *46-50*
Nonresidential Burglary	IV	12[4]	15	18	21	24 *22-25*	27 *26-28*	30 *29-31*
Theft Crimes (Over $2,500)	III	12[4]	13	15	17	19 *18-20*	21 *20-22*	23 *22-24*
Theft Crimes ($2,500 or less) Check Forgery ($200-$2,500)	II	12[4]	12[4]	13	15	17	19	21 *20-22*
Sale of Simulated Controlled Substance	I	12[4]	12[4]	12[4]	13	15	17	19 *18-20*

☐ Presumptive commitment to state imprisonment. First Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence. See section II.E. Mandatory Sentences, for policy regarding those sentences controlled by law, including minimum periods of supervision for sex offenders released from prison.

▨ Presumptive stayed sentence; at the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation. However, certain offenders in this section of the grid always carry a presumptive commitment to state prison. These offenses include Third Degree Controlled Substance Crimes when the offender has a prior felony drug conviction, Burglary of an Occupied Dwelling when the offender has a prior felony burglary conviction, Second and Subsequent Criminal Vehicle Conduct offenses and offenses carrying a mandatory minimum prison term due to the use of a dangerous weapon (e.g., Second Degree Assault). See sections II.C. Presumptive Sentence and II.E. Mandatory Sentences.

[1] One year and one day.

[2] Pursuant to M.S. § 609.342, subd. 2 and 609.343, subd. 2, the presumptive sentence for Criminal Sexual Conduct in the First Degree is a minimum of 144 months and the presumptive sentence for Criminal Sexual Conduct in the Second Degree – clauses (c, (d, (e), (f), and (h) is a minimum of 90 months (see II.C. Presumptive Sentence and II.D. Convictions for Attempts, Conspiracies, and Other Sentence Modifiers).

B. Extract from the Sentencing Act (2011) [Amendment #113, Israeli Penal Law, 1977][76]

40a Purpose
The purpose of this section is to set forth the principles and the considerations guiding sentencing, the weight that is to be accorded them, and the relationship between them, such that the Court will determine the sentence appropriate to the offender considering the circumstances of the offense.

40b The Guiding Principle: Proportionality
The guiding principle in sentencing is proportionality between the seriousness of the offense committed by the offender and the degree of his culpability, and the type and severity of his punishment.

40c Determining the Proportionate Sentence Range / Determining the Sentence
(a) The Court shall determine a "Proportionate Sentence Range" for the offense committed by the offender in accordance with the guiding principle; for that purpose, the Court will consider the societal "values" harmed by the offense, the degree/level of that harm, customary sentencing practices [for that offense], and the circumstances related to the commission of the offense, as delineated in Article 40i.
(b) The Court shall decide the offender's sentence within the aforementioned Sentence Range, taking into consideration the circumstances unrelated to the commission of the offense, as delineated in Article 40k; however, the Court may deviate from the Proportionate Sentence Range for reasons of rehabilitation or the protection of public safety, as delineated in Articles 40d and 40e.

40d Rehabilitation
(a) If the Court determines the Proportionate Sentence Range in accordance with the guiding principle, and [then] determines that there is a "serious likelihood" that the offender will be rehabilitated or has been rehabilitated, the Court may deviate from the Proportionate Sentence Range and decide the offender's sentence in accordance with his rehabilitative needs, and may instruct the offender to undertake rehabilitative action; for purposes of this article, "rehabilitative action" includes, inter alia, [...].
(b) If the offense is exceptionally serious, or the offender's culpability is exceptionally high, the Court may not deviate from the Proportionate Sentence Range pursuant to subsection (a), even if there is a serious likelihood that the offender will be rehabilitated or if he has been rehabilitated, except in unusual and extraordinary circumstances, after the Court has been persuaded that these circumstances "trump" the need to decide the offender's sentence according to the guiding principle; the Court shall enumerate its justifications in its ruling.

40e Protection of Public Safety
If the Court determines the Proportionate Sentence Range in accordance with the guiding principle, and [then] determines that there is a "serious likelihood" that the offender will continue to commit crimes, and that it is necessary to separate him from the public and increase his punishment in order to protect the public, the Court may take this into account when deciding the offender's sentence, so long as the sentence does not deviate significantly from the Proportionate Sentence Range; the Court shall

[76] Unofficial translation by Gazal-Ayal and Roberts based on an earlier version by Efrat Hakak.

not do so unless the offender has a substantial criminal record or if a professional report has been presented to the Court.

40f Individual Deterrence
If the Court determines that it is necessary to deter the offender from committing another offense, and that there is a serious likelihood that the imposition of a specific sentence will deter him, the Court may take this consideration into account when deciding the offender's sentence, so long as the sentence does not deviate from the Proportionate Sentence Range.

40g General Deterrence
If the Court determines that it is necessary to deter the public from committing offenses of the same type that the offender committed, and that there is a serious likelihood that an increase in his sentence will deter the public, the Court may take this into account when deciding the offender's sentence, so long as the sentence does not deviate from the Proportionate Sentence Range.

40h Fines
If the Court has determined that the appropriate sentence for the offender under the circumstances of the offense includes a monetary fine, the Court shall determine the Proportionate Sentence Range for that offense while taking into account, in addition to 40c(a), the offender's financial circumstance.

40i Circumstances related to the commission of the offense
(a) In determining the Proportionate Sentence Range, pursuant to article 40c(a), the Court shall consider the circumstances related to the commission of the offense, as delineated below, [and the degree to which they are present], if the Court believes that they affect the seriousness of the offense and the offender's level of culpability:
(1) the preparation that preceded the commission of the offense;
(2) the offender's role in the commission of an offense committed by a number of perpetrators, and the degree to which another person influenced the offender in the commission of the offense;
(3) the harm that was anticipated as a result of the commission of the offense;
(4) the harm that was caused as a result of the commission of the offense;
(5) the offender's culpability as manifested in the reasons that brought the offender to commit the offense;
(6) the offender's ability to understand what he does, the illegitimate nature of his action, or the significance of his action, including as a consequence of his age;
(7) the offender's ability to abstain from committing the act, and his control over his actions, including as a result of provocation;
(8) the offender's psychological distress as a result of his abuse at the hands of the victim;
(9) the proximity to the legal defenses to criminal responsibility as set out in Section B, Chapter 5-1;
(10) the cruelty, violence, or abuse of the victim, or the exploitation of the victim;
(11) the offender's abuse of his power or abuse of his status, or the exploitation of his relationship with the victim.
(b) The Court shall consider circumstances (a)(6)-(9) only if the Court believes that they mitigate the seriousness of the offense and the offender's culpability, and shall

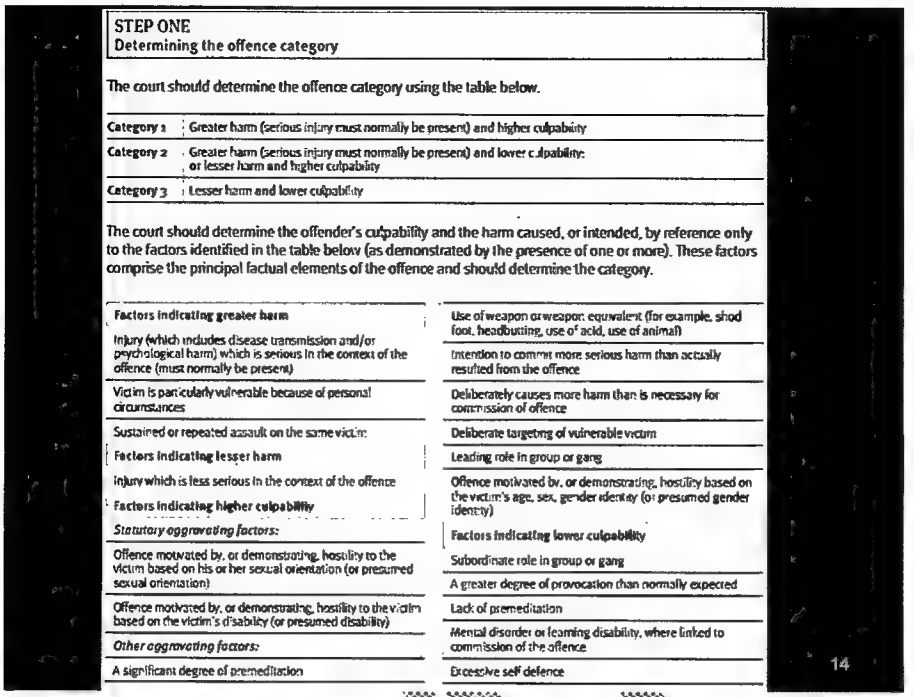
consider circumstances (a)(10) and (11) only if the Court believes that they aggravate the seriousness of the offense and the offender's culpability.

40j Proof
(a) The Court shall determine the existence of circumstances related to the commission of the offense based on evidence brought before the court during the trial stage [i.e. not the sentencing stage];
(b) Subsection (a) notwithstanding –
(1) the offender may adduce evidence during the sentencing stage, so long as the evidence does not contradict his claims made during the trial stage; both parties may bring evidence during the sentencing stage if the law requires it;
(2) the Court may, at the request of one of the parties, allow the parties to adduce evidence during the sentencing stage, if it is convinced that it was not possible to adduce it during the trial stage, or if it will cause an obstruction of justice.
(c) The Court shall employ the reasonable-doubt standard of proof for aggravating circumstances, and the civil standard of proof for mitigating circumstances.
(d) Subsection (b)(2) notwithstanding – if the offender pled guilty to the facts set out in the indictment, whether before evidence was brought before the Court or after, the indictment shall include all the facts and circumstances related to the commission of the offense.

40k Circumstances unrelated to the commission of the offense
(a) In deciding the offender's sentence [within the Proportionate Sentence Range], pursuant to article 40c(b), the Court may consider circumstances unrelated to the commission of the offense, as delineated below, and the degree to which they occur, if the Court believes that it is appropriate to take them into consideration, and so long as the sentence does not deviate from the Proportionate Sentence Range:
(1) the harmful impact of the punishment on the offender, including as a consequence of his age;
(2) the harmful impact of the punishment on the offender's family;
(3) the harms that occurred to the offender as a result of the commission of the offense and his conviction;
(4) whether the offender took responsibility for his actions, and the degree to which he has become, or is making an effort to become, law-abiding;
(5) the effort that the offender made to "fix" the consequences of his offense, and to compensate for the harm he caused;
(6) the offender's cooperation with law enforcement agencies; however, the court shall not penalize the offender for pleading "not guilty" and going to trial;
(7) the offender's good behavior and his contribution to society;
(8) the offender's difficult life-circumstances, which affected the commission of the offense;
(9) the behavior of the enforcement agencies;
(10) the time that has elapsed since the commission of the offense;
(11) the offender's previous criminal convictions or lack thereof.

40l Additional Circumstances: Notwithstanding the provisions of articles 40i and 40k, the Court may consider additional circumstances related to the commission of the offense in order to determine the Proportionate Sentence Range and may consider additional circumstances unrelated to the commission of the offense in order to determine the offender's sentence.

C: Extract from Definitive Assault Offences Guideline (England and Wales)



STEP ONE
Determining the offence category

The court should determine the offence category using the table below.

Category 1	Greater harm (serious injury must normally be present) and higher culpability
Category 2	Greater harm (serious injury must normally be present) and lower culpability; or lesser harm and higher culpability
Category 3	Lesser harm and lower culpability

The court should determine the offender's culpability and the harm caused, or intended, by reference only to the factors identified in the table below (as demonstrated by the presence of one or more). These factors comprise the principal factual elements of the offence and should determine the category.

Factors indicating greater harm	Use of weapon or weapon equivalent (for example, shod foot, headbutting, use of acid, use of animal)
Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence (must normally be present)	Intention to commit more serious harm than actually resulted from the offence
Victim is particularly vulnerable because of personal circumstances	Deliberately causes more harm than is necessary for commission of offence
Sustained or repeated assault on the same victim	Deliberate targeting of vulnerable victim
Factors indicating lesser harm	Leading role in group or gang
Injury which is less serious in the context of the offence	Offence motivated by, or demonstrating, hostility based on the victim's age, sex, gender identity (or presumed gender identity)
Factors indicating higher culpability	**Factors indicating lower culpability**
Statutory aggravating factors:	Subordinate role in group or gang
Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)	A greater degree of provocation than normally expected
Offence motivated by, or demonstrating, hostility to the victim based on the victim's disability (or presumed disability)	Lack of premeditation
Other aggravating factors:	Mental disorder or learning disability, where linked to commission of the offence
A significant degree of premeditation	Excessive self defence

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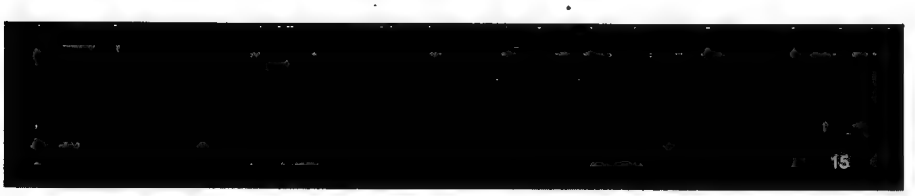
STEP TWO
Starting point and category range

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Offence Category	Starting Point *(Applicable to all offenders)*	Category Range *(Applicable to all offenders)*
Category 1	1 year 6 months' custody	1 – 3 years' custody
Category 2	26 weeks' custody	Low level community order – 51 weeks' custody
Category 3	Medium level community order	Band A fine – High level community order



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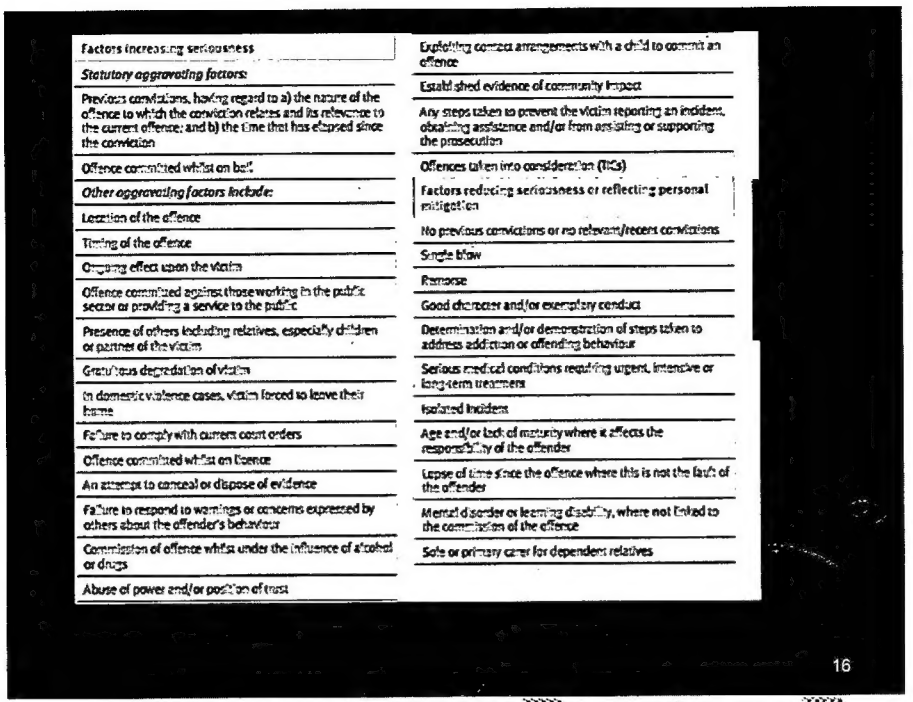

Factors increasing seriousness	Exploiting contact arrangements with a child to commit an offence
Statutory aggravating factors:	Established evidence of community impact
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction	Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution
Offence committed whilst on bail	Offences taken into consideration (TICs)
Other aggravating factors include:	Factors reducing seriousness or reflecting personal mitigation
Location of the offence	No previous convictions or no relevant/recent convictions
Timing of the offence	Single blow
Ongoing effect upon the victim	Remorse
Offence committed against those working in the public sector or providing a service to the public	Good character and/or exemplary conduct
Presence of others including relatives, especially children or partner of the victim	Determination and/or demonstration of steps taken to address addiction or offending behaviour
Gratuitous degradation of victim	Serious medical conditions requiring urgent, intensive or long-term treatment
In domestic violence cases, victim forced to leave their home	Isolated incident
Failure to comply with current court orders	Age and/or lack of maturity where it affects the responsibility of the offender
Offence committed whilst on licence	Lapse of time since the offence where this is not the fault of the offender
An attempt to conceal or dispose of evidence	Mental disorder or learning disability, where not linked to the commission of the offence
Failure to respond to warnings or concerns expressed by others about the offender's behaviour	Sole or primary carer for dependent relatives
Commission of offence whilst under the influence of alcohol or drugs	
Abuse of power and/or position of trust	

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STEP THREE
Consider any other factors which indicate a reduction, such as assistance to the prosecution
The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR
Reduction for guilty pleas
The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP FIVE
Dangerousness
Assault occasioning actual bodily harm and racially/religiously aggravated ABH are specified offences within the meaning of Chapter 5 of the Criminal Justice Act 2003 and at this stage the court should consider whether having regard to the criteria contained in that Chapter it would be appropriate to award an extended sentence.

STEP SIX
Totality principle
If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.

STEP SEVEN
Compensation and ancillary orders
In all cases, the court should consider whether to make compensation and/or other ancillary orders.

STEP EIGHT
Reasons
Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

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D Other functions of the Sentencing Council

127 Resource implications of guidelines

(1)This section applies where the Council—

(a) publishes draft guidelines under section 120 or 122, or

(b) issues guidelines as definitive guidelines under either of those sections.

(2) The Council must publish a resource assessment in respect of the guidelines.

(3) A resource assessment in respect of any guidelines is an assessment by the Council of the likely effect of the guidelines on—

(a) the resources required for the provision of prison places,

(b) the resources required for probation provision, and

(c) the resources required for the provision of youth justice services.

(4) The resources assessment must be published—

(a) in a case within subsection (1)(a), at the time of publication of the draft guidelines;

(b) in a case within subsection (1)(b), at the time the guidelines are issued or, where the guidelines are issued by virtue of section 123, as soon as reasonably practicable after the guidelines are issued.

(5) The Council must keep under review any resource assessment published under this section, and, if the assessment is found to be inaccurate in a material respect, publish a revised resource assessment.

128 Monitoring

(1)The Council must—

(a) monitor the operation and effect of its sentencing guidelines, and

(b) consider what conclusions can be drawn from the information obtained by virtue of paragraph (a).

(2) The Council must, in particular, discharge its duty under subsection (1)(a) with a view to drawing conclusions about—

(a) the frequency with which, and extent to which, courts depart from sentencing guidelines;

(b) the factors which influence the sentences imposed by courts;

(c) the effect of the guidelines on the promotion of consistency in sentencing;

(d) the effect of the guidelines on the promotion of public confidence in the criminal justice system.

(3) When reporting on the exercise of its functions under this section in its annual report for a financial year, the Council must include—

(a) a summary of the information obtained under subsection (1)(a), and

(b) a report of any conclusions drawn by the Council under subsection (1)(b).

129 Promoting awareness

(1) The Council must publish, at such intervals as it considers appropriate—

(a) in relation to each local justice area, information regarding the sentencing practice of the magistrates' courts acting in that area, and

(b) in relation to each location at which the Crown Court sits, information regarding the sentencing practice of the Crown Court when it sits at that location.

(2) The Council may promote awareness of matters relating to the sentencing of offenders by courts in England and Wales, including, in particular—

(a) the sentences imposed by courts in England and Wales;

(b) the cost of different sentences and their relative effectiveness in preventing re-offending;

(c) the operation and effect of guidelines under this Chapter.

(3) For the purposes of subsection (2), the Council may, in particular, publish any information obtained or produced by it in connection with its functions under section 128(1).

130 Resources: effect of sentencing practice

(1) The annual report for a financial year must contain a sentencing factors report.

(2) A sentencing factors report is an assessment made by the Council, using the information available to it, of the effect which any changes in the sentencing practice of courts are having or are likely to have on each of the following—

(a) the resources required for the provision of prison places;

(b) the resources required for probation provision;

(c) the resources required for the provision of youth justice services.

131 Resources: effect of factors not related to sentencing

(1) The annual report for a financial year must contain a non-sentencing factors report.

(2) The Council may, at any other time, provide the Lord Chancellor with a non-sentencing factors report, and may publish that report.

(3) A non-sentencing factors report is a report by the Council of any significant quantitative effect (or any significant change in quantitative effect) which non-sentencing factors are having or are likely to have on the resources needed or available for giving effect to sentences imposed by courts in England and Wales.

(4) Non-sentencing factors are factors which do not relate to the sentencing practice of the courts, and include—

(a) the recalling of persons to prison;

(b) breaches of orders within subsection (5);

(c) patterns of re-offending;

(d) decisions or recommendations for release made by the Parole Board;

(e) the early release under discretionary powers of persons detained in prison;

(f) the remanding of persons in custody.

(5) The orders within this subsection are—

(a) community orders (within the meaning of section 177 of the Criminal Justice Act 2003 (c. 44)),

(b) suspended sentence orders (within the meaning of section 189(7) of that Act), and

(c) youth rehabilitation orders (within the meaning of Part 1 of the Criminal Justice and Immigration Act 2008 (c. 4)).

132 Duty to assess impact of policy and legislative proposals

(1) This section applies where the Lord Chancellor refers to the Council any government policy proposal, or government proposal for legislation, which the Lord Chancellor considers may have a significant effect on one or more of the following—

(a) the resources required for the provision of prison places;

(b) the resources required for probation provision;

(c) the resources required for the provision of youth justice services.

(2) For the purposes of subsection (1)—

- "government policy proposal" includes a policy proposal of the Welsh Ministers;
- "government proposal for legislation" includes a proposal of the Welsh Ministers for legislation.

(3) The Council must assess the likely effect of the proposal on the matters mentioned in paragraphs (a) to (c) of subsection (1).

(4) The Council must prepare a report of the assessment and send the report—

(a) to the Lord Chancellor, and

(b) if the report relates to a proposal of the Welsh Ministers, to the Welsh Ministers.

(5) A single report may be prepared of the assessments relating to 2 or more proposals.

(6) If the Lord Chancellor receives a report under subsection (4) the Lord Chancellor must, unless it relates only to a proposal of the Welsh Ministers, lay a copy of it before each House of Parliament.

(7) If the Welsh Ministers receive a report under subsection (4) they must lay a copy of it before the National Assembly for Wales.

(8) The Council must publish a report which has been laid in accordance with subsections (6) and (7).

(9) In this section "legislation" means—

(a) an Act of Parliament if, or to the extent that, it extends to England and Wales;

(b) subordinate legislation made under an Act of Parliament if, or to the extent that, the subordinate legislation extends to England and Wales;

(c) a Measure or Act of the National Assembly for Wales or subordinate legislation made under such a Measure or Act.